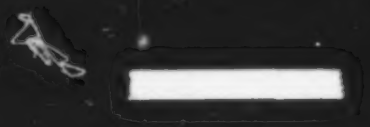
Petition



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81-1119

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re: HOWARD ELLIS, *et alia*,
Petitioners,

and

ALLEN FAILS, *et alia*,
Petitioners.

PETITION FOR WRITS OF PROHIBITION AND MANDAMUS, OR ALTERNATIVELY FOR A WRIT OF CERTIORARI; *and* APPENDIX

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QUESTIONS PRESENTED

Did a panel of the United States Court of Appeals for the Ninth Circuit abuse its discretion under 28 U.S.C. § 455(a) (1976) when it refused to disqualify itself from consideration of these cases on appeal after: (a) Petitioners informed it through affidavit that an attorney for the adverse party had claimed the ability to "control the panel we get at the 9th Circuit"; and (b) attorneys for the adverse party admitted in substance through affidavits that they had discussed the possibility of "fixing" the composition of the panel?

Did a judge of the United States Court of Appeals for the Ninth Circuit abuse his discretion under 28 U.S.C. § 455(a) (1976) when he refused to recuse himself from the panel considering these cases on appeal, notwithstanding his record of extreme sympathy for the claims of Petitioners' adversaries and his expressions of antagonism to Petitioners' cause during oral argument of the appeal?

PARTIES TO THESE PROCEEDINGS

The parties in these consolidated cases include Petitioners Howard Ellis and Allen Fails, representing as Plaintiffs/Appellants/Cross-Appellees below some 151 similarly situated employees, and the Brotherhood of Railway, Airline and Steamship Clerks (BRAC), and its affiliated organizations BRAC System Board of Adjustment No. 451, California State Legislative Committee of BRAC, Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014, and Arrowliner Lodge Local 3049, Defendants/Appellees/Cross-Appellants below.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re: HOWARD ELLIS, *et alia*,
Petitioners,

and

ALLEN FAILS, *et alia*,
Petitioners.

PETITION FOR WRITS OF PROHIBITION AND MANDAMUS, OR ALTERNATIVELY FOR A WRIT OF CERTIORARI

Petitioners Howard Ellis, *et alia*, and Allen Fails, *et alia*, respectfully petition this Court to issue writs of prohibition and mandamus, requiring that:

1. the Honorable Harry Pregerson and Arthur L. Alarcon, Judges of the United States Court of Appeals for the Ninth Circuit, and the Honorable Francis C. Whelan, Senior District Judge of the United States District Court for the Central District of California, cease and desist forthwith from any and all participation in further appellate proceedings in the cases of *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*, No. 80-5562, and *Fails* v. *Brotherhood of Railway, Airline*

and Steamship Clerks, No. 80-5603, now pending in the United States Court of Appeals for the Ninth Circuit;

2. said judges vacate their Order of 2 November 1981,[1] denying Petitioners' Emergency Motion for Extraordinary Relief in that Court;[2]

3. Judge Pregerson vacate his Order of 2 November 1981,[3] denying Petitioners' Emergency Motion for Recusal in that Court;[4] and

4. the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit, designate an *en banc* panel not including Judges Pregerson, Alarcon, or Whelan, to hear and decide the aforesaid cases.

In the alternative, Petitioners respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, in order to bring the aforesaid cases directly to this Court for hearing and decision.

OPINIONS BELOW

The subject-matter of this Petition is two Orders the United States Court of Appeals for the Ninth Circuit promulgated on 2 November 1981. One of these Orders—*per* the panel composed of Judges Pregerson, Alarcon, and Whalen—denied Petitioners' Emergency

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[1] Appendix (App.) at 5a.

[2] App. at 21a.

[3] App. at 11a.

[4] App. at 35a.

Motion for Extraordinary Relief in that court.[5] The other Order—*per* Judge Pregerson alone—denied Petitioners' Emergency Motion for Recusal.[6]

Also relevant are the trial-opinions of the United States District Court for the Southern District of California granting interlocutory summary judgment in Petitioners' favor,[7] modifying that judgment prior to trial,[8] and entering final judgment.[9]

JURISDICTION

Petitioners Howard Ellis, *et alia,* filed their action against BRAC on 20 March 1973; and Petitioners Allen Fails, *et alia,* filed their companion action on 23 March 1973. Both complaints alleged federal subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 (1976). After consolidation of the cases, the District Court granted interlocutory summary judgment in favor of Petitioners.[10] Having held a trial, the Court entered final judgment.[11] Both Petitioners and BRAC then seasonably appealed to the United States Court of Appeals for the Ninth Circuit.

Prior to receipt of advice from the Circuit Court concerning the identities of the Judges on the appellate panel, Petitioners filed their Suggestion of Appropri-

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[5] App. at 5a.

[6] App. at 11a.

[7] 91 L.R.R.M. 2339 (S.D. Cal. 1976).

[8] 93 L.R.R.M. 2976 (S.D. Cal. 1976).

[9] 88 Lab. Cas. ¶ 11,986 (S.D. Cal., 14 Mar. 1980).

[10] 91 L.R.R.M. 2339 (S.D. Cal. 1976).

[11] 88 Lab. Cas. ¶ 11,986 (S.D. Cal., 14 Mar. 1980).

ateness of Hearing En Banc,[12] in an attempt to obviate the difficulty that subsequently arose and now prompts this Petition.[13] One week before oral argument on the merits, Petitioners discovered that the Circuit Court had denied their request for *en banc* consideration of the appeal, and selected Judges Pregerson, Alarcon, and Whelan for the panel.[14] Petitioners immediately filed their Emergency Motion for Extraordinary Relief [15] and their Emergency Motion for Recusal.[16] The panel and Judge Pregerson, respectively, denied those motions,[17] and held oral argument on the merits of the appeals on 2 November 1981. Petitioners now seek relief here.

This Court has jurisdiction over the matter under the All Writs Act.[18]

JUDICIAL CODE PROVISIONS INVOLVED

28 U.S.C. § 455(a) (1976). Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1651(a) (1976). The Supreme Court * * * may issue all writs necessary or appropriate in

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[12] App. at 41a.

[13] *See* Affidavit of Michael E. Merrill, Esq., App. at 1a.

[14] *Id.*, App. at 1a.

[15] App. at 21a.

[16] App. at 35a.

[17] App. at 5a, 11a.

[18] 28 U.S.C. § 1651(a) (1976).

aid of * * * jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Petitioners are employees of Western Airlines, who were subject to collective-bargaining agreements their employer successively negotiated with BRAC under color of the Railway Labor Act.[19] One provision of these agreements required those of Petitioners who were members of BRAC to pay that organization full membership-dues, and required those of Petitioners who were non-members to pay a fee monetarily equivalent to dues.[20]

To contest the validity of these assessments under federal statutory and constitutional law, Petitioners filed suits in the United States District Court for the Southern District of California, alleging subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 (1976). From the onset, Petitioners requested and received legal assistance from the National Right to Work Legal Defense Foundation, a charitable organization[21] that aids victims of injustices arising out of compulsory unionism.

The District Court granted interlocutory summary judgment for Petitioners,[22] modified that judgment in

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[19] § 2, Fourth, 45 U.S.C. § 152, Fourth (1976).

[20] *See* Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976).

[21] I.R.C. § 501(c)(3), *held applicable in* National Right to Work Legal Defense & Educ. Foundation, Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979).

[22] 91 L.R.R.M. 2339 (S.D. Cal. 1976).

various particulars not relevant here,[23] and entered final judgment after appropriate hearings.[24] Prior to its entry of judgment, the Court held oral argument on 23 October 1979, at which time occurred the events that ultimately gave rise to this Petition.[25] Upon entry of final judgment, both Petitioners and BRAC filed timely appeals.

Concerned that certain statements of BRAC's attorneys which one of Petitioners' counsel overheard on 23 October 1979 indicated the likelihood that improper influences might be brought to bear on the selection of the appellate panel in order to "fix" it in BRAC's favor, Petitioners filed their Suggestion of Appropriateness of Hearing En Banc,[26] well in advance of the Circuit Court's selection of Judges Pregerson, Alarcon, and Whelan to hear the case. One week before the scheduled oral argument of 2 November 1981, Petitioners discovered that the Court had denied their request for *en banc* consideration, and that the aforesaid judges would constitute the panel.[27] Seeing in the selection of Judge Pregerson strong evidence that BRAC had successfully engineered the "fix" they feared,[28] Petitioners immediately filed their Emergency Motion for Extraordinary Relief [29] and their Emergency Mo-

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[23] 93 L.R.R.M. 2976 (S.D. Cal. 1976).

[24] 88 Lab. Cas. ¶ 11,986 (S.D. Cal., 14 Mar. 1980).

[25] *Post*, pp. 7-9.

[26] App. at 41a.

[27] App. at 1a.

[28] *Post*, pp. 9-12.

[29] App. at 21a.

tion for Recusal,[30] for the first time detailing the events of 23 October 1979. On the day of the oral argument, however, the panel denied the first motion; [31] and Judge Pregerson denied the second.[32]

The remarks of BRAC's attorneys on 23 October 1979 are recounted in the affidavit Hugh L. Reilly, Esq., co-counsel for Petitioners, submitted to the Court of Appeals:

> On October 23, 1979, I was in the courtroom of Judge Leland Nielson for argument on post-trial review. The courtroom is arranged with plaintiffs' and defendants' counsel tables side-by-side, but separated by perhaps twelve feet. Each counsel table has three, or more, chairs, and is about twelve feet long. A rail, with a center gate, separates counsel tables from spectator seating.
>
> On that occasion Michael E. Merrill and I represented [Petitioners]. Joseph Rauh and Mary Levy represented [BRAC]. A person then unknown to me, but later identified by the court as George Bodle (co-counsel for [BRAC]), was present in the courtroom, but did not sit at counsel table for the argument.
>
> On a recess, Mr. Bodle joined other [of BRAC's] counsel at counsel table. Mr. Rauh was standing at the end of the table closest to plaintiffs' counsel, but facing away from them. Mr. Bodle and Ms. Levy were at the chairside of the other end of [BRAC's] table, facing Mr. Rauh.
>
> At that point, Mr. Bodle said, addressing Mr. Rauh, "I think I can control the panel we get at

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[30] App. at 35a.

[31] App. at 5a.

[32] App. at 11a.

> the 9th Circuit." Mr. Rauh then turned and looked at [Petitioners'] counsel, and walked around the front to the other end of the table. [BRAC's] attorneys huddled together in discussion, and, when they broke from the huddle, Mr. Rauh said, "We will be in constant touch with your [*i.e.*, Bodle's] office."[33]

From the statement of Bodle that "I think I can control the panel we get at the 9th Circuit", Reilly concluded that BRAC's attorneys were at least contemplating some attempt to manipulate or influence through improper means the selection of the judges to hear the appeal in this case.

In a counter-affidavit he submitted to the Circuit Court, George E. Bodle, Esq., co-counsel for BRAC, admitted that a conversation took place on 23 October 1979 during which the subject of improper influence arose:

> On October 23, 1979, I do remember stating to Mr. Rauh that based on my experience there were judges on this Court who were unsympathetic to unions and judges who were sympathetic. I also stated that there were some judges on the Court whom I had known for many years, for whose ability and judicial temperment I had the highest regard, and who if they knew of the case's importance might seek to sit on the appellate panel. Mr. Rauh responded that it would be improper to provide that information to a sitting judge and that there would be no effort to do so. I agreed. I did not make the statement attributed to me in the affidavit on file herein or any statement from which such a connotation could be derived.[34]

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[33] App. at 32a-33a.

[34] App. at 19a-20a.

And in another counter-affidavit, Joseph L. Rauh, Jr., Esq., co-counsel for BRAC, also conceded that such a discussion went on:

> I do not have a clear recollection of any conversation with Mr. Bodle on October 23, 1979, but I do recollect that at some time, while the case was still in the District Court, Mr. Bodle stated that he was acquainted with certain of the judges on this Court and that if they became aware of the case's existence and importance, they might wish to participate in its consideration. I made it clear that I would not countenance any contact with the Court or its staff. Mr. Bodle agreed completely. He has assured me that neither he nor, to his knowledge, has anyone else made any contact of any kind with the Court or the office of the Clerk. Actually, Mr. Bodle has had no connection whatsoever with this case in this Court other than having his firm's name carried as local counsel.[35]

Thus, there is no dispute that, on 23 October 1979, in a court-room of a United States District Court, attorneys for BRAC openly ruminated over the possibility of "provid[ing] * * * information to * * * sitting judge[s]" who might be "sympathetic" to unions, in order to encourage those judges to "seek to sit on the appellate panel" and "to participate in * * * consideration" of this case. And there is no dispute that those attorneys knew at that time (and now acknowledge) the substance of those ruminations to have been "improper" and not to be "countenance[d]".

Under these circumstances, Petitioners were not entirely surprised—if none the less shocked—when they learned that, out of more than thirty-one possible can-

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[35] App. at 18a.

didates,[36] Judge Pregerson had been selected, not only to serve as a member of the appellate panel, but to be its chairman as well.[37] For Petitioners knew Judge Pregerson to be highly "sympathetic" to unions, particularly with regard to the issues involved in this litigation.

Indeed, while in the United States District Court for the Central District of California, Judge Pregerson had presided over the proceedings in *Seay* v. *McDonnell Douglas Corp.* (*International Association of Machinists*),[38] a case supported by the National Right to Work Legal Defense Foundation that involved the statutorily and constitutionally correct definition of "collective bargaining, contract administration, and grievance adjustment" under the provision of the National Labor Relations Act[39] analogous to the provision of the Railway Labor Act involved here.[40] In *Seay*, Judge Pregerson adopted an excessively expansive definition of "collective bargaining", including within its ambit even overt political activity.[41] His views there thus directly contradicted this Court's opinions both before[42]

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[36] The United States Court of Appeals for the Ninth Circuit consists of 23 Circuit Judges and 8 Senior Circuit Judges. Numerous District Judges (such as Judge Whelan) may also sit by designation.

[37] Affidavit of Michael E. Merrill, Esq., App. at 3a.

[38] No. 67-1394-HP (C.D. Cal., filed 22 Sept. 1967).

[39] § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

[40] § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976).

[41] Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761 n.7 (C.D. Cal. 1973).

[42] IAM v. Street, 367 U.S. 740 (1961); BRAC v. Allen, 373 U.S. 113 (1963).

and since,[43] were twice reversed by the Court of Appeals,[44] and were diametrically opposed to the decision of the District Court in this case.[45] Petitioners, therefore, had ample reason to suspect his less-than-impartial reception of their claims on appeal.

Far from allaying these concerns, Judge Pregerson's remarks at the oral argument of 2 November 1981 exacerbated them. Rather than investigating the issues the appeals raised, or the nature of applicable judicial precedents, Judge Pregerson appeared more concerned with interrogating Petitioners' co-counsel as to "[h]ow many of these similar cases are pending across the country", whether he is "counsel in each of those cases", and whether "the [National Right to Work] organization [is] involved in each of those cases".[46] From this inquisition, Petitioners' counsel concluded that Judge Pregerson not only was as "sympathetic" to unions as he had been during the *Seay* litigation, but also was correspondingly antagonistic to "similar cases" challenging the power of unions to extract exorbitant compulsory fees from dissenting employees, to the attorney (Mr. Merrill) who participated in several of these cases, and to the organization (National Right to Work) that provided the legal assistance necessary for the cases' continued prosecution.

In light of the statement of attorney Bodle on 23 October 1979 that "I can control the panel we [*i.e.*,

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[43] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[44] Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970); Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976).

[45] 91 L.R.R.M. 2339, 2341-42 (S.D. Cal. 1976).

[46] Affidavit of Michael E. Merrill, Esq., App. at 3a-4a.

BRAC] get at the 9th Circuit", of the admissions by both Bodle and co-counsel Rauh that Bodle did in fact make "improper" remarks of this nature on that date, of the extreme improbability that the selection of a judge with such outspokenly *pro*-union proclivities as Judge Pregerson's could be merely "random", of Judge Pregerson's refusal to recuse himself and the Circuit Court's denial of any other relief, and of Judge Pregerson's hostile attitude as expressed at the oral argument of 2 November 1981, Petitioners decided that this Court's intervention by extraordinary writ was mandatory to forefend a perversion of the judicial process and a subversion of justice.

ARGUMENT

The facts of these cases are stark: Petitioners' co-counsel Reilly described the court-room conversation between BRAC's attorneys Bodle and Rauh in which Bodle advised Rauh that "I can control the panel we get at the 9th Circuit".[47] Neither Bodle nor Rauh denied that this conversation took place, or even that its content was clearly "improper". Instead, both in substance admitted their conspiratorial plotting to "fix" the appellate panel—in Bodle's euphemistic language, "to provide * * * information to a sitting judge";[48] and in Rauh's circumlocution, to make "contact with the Court or its staff".[49] Their only "defense" was that they had not employed the outrageous language Reilly quoted, and in any event had purportedly abandoned this brazen conspiracy almost at the

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[47] Affidavit of Hugh L. Reilly, Esq., App. at 32a.

[48] Affidavit of George E. Bodle, Esq., App. at 19a.

[49] Affidavit of Joseph L. Rauh, Jr., Esq., App. at 18a.

outset—in Bodle's version, recounting how "Mr. Rauh responded that it would be improper to provide that information to a sitting judge and that there would be no effort to do so";[50] and in Rauh's story, claiming that "I [*i.e.*, Rauh] made it clear that I would not countenance any contact with the Court or its staff. Mr. Bodle agreed completely".[51] Bodle and Rauh, in short, did not *deny* the substance or purport of Reilly's charges with outraged *innocence*. No, indeed. Caught in scheming to perpetrate a judicial fraud, they *admitted* those charges with subdued *contrition*, hiding behind Rauh's lame assertion that "[Bodle] has assured me that neither he nor, to his knowledge, has anyone else made any contact of any kind with the Court or the office of the Clerk".[52]

Yet, in the event, who appeared on the appellate panel but Judge Pregerson—a notorious partisan of compulsory unionism from as long ago as the *Seay* litigation, and (if his remarks at the oral argument of 2 November 1981 in this case are any indication) even today an ideological antagonist of Petitioners and the legal-aid foundation assisting them? Surely, here is a coincidence of remarkable serendipity for BRAC: Its attorneys plot to "fix" the composition of the appellate panel; recognizing the impropriety of their scheme, they (supposedly) desist from implementing it; but, nevertheless, the Circuit Court "randomly" selects as chairman of the panel perhaps the very judge most "sympathetic"—*and known to be "sympathetic"*—to BRAC's position! To be sure, one possible explanation

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[50] Affidavit of George E. Bodle, Esq., App. at 19a.

[51] Affidavit of Joseph L. Rauh, Jr., Esq., App. at 18a.

[52] *Id.*

of this almost-miraculous happening is that Providence rewards those who, having once strayed, return of their own accord to the paths of righteousness. A more plausible explanation, though, is that something other, and less lofty, than Providence was at work here.

None the less, the Court of Appeals' panel refused to take any action, instead resolving every possible factual issue in BRAC's favor on the airy, but unproven, assertion that the Court's process for selecting appellate panels is "foolproof".[53] Judge Pregerson, too, refused to recuse himself,[54] apparently willing to endure the stigma of impropriety as the necessary cost of participating as an appellate decision-maker in, as he put it, one of "those cases" that "the [National Right to Work] organization [is] involved in".[55] Under these circumstances, both refusals to act constituted abuses of discretion.

The applicable section of the Judicial Code provides that "[a]ny * * * judge * * * of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned".[56] The provision thus mandates disqualification where "impartiality" is reasonably *in doubt,* not simply where the evidence is conclusive. The reasonable "appearance rather than the fact of bias" suffices to invoke the sta-

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[53] Order of 2 November 1981, App. at 6a. The Acting Clerk's vague and unsworn memorandum, consisting of hearsay of unidentified employees of the Court of Appeals, is not proof that the "standard" procedures were not circumvented or subverted. *See* App. at 9a.

[54] Order of 2 November 1981, App. at 11a.

[55] Affidavit of Michael E. Merrill, Esq., App. at 3a-4a.

[56] 28 U.S.C. § 455(a) (1976).

tutory preclusion of a particular judge from participation in a case.[57]

This case assaults any open-minded onlooker's vision with more than an "appearance of bias". Indeed, it projects a series of admissions of impropriety by BRAC's attorneys, of remarkable "coincidences", of indefensible refusals to act by the Court of Appeals' panel and by Judge Pregerson, and of partisan statements by Judge Pregerson at the oral argument of 2 November 1981 that in their totality overwhelm the senses with the sight, sound, and smell of bias throughout.

Even the Court of Appeals itself conceded the "appearance of bias" when it "requested" BRAC's attorneys Bodle and Rauh to respond under oath to Petitioners' charges,[58] and initiated an *ex parte* investigation into the manner of the panel's selection.[59] The panel, too, admitted by conduct its serious doubts about the propriety of hearing and deciding this case under a cloud of suspicion.[60] Yet neither the Court nor the

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[57] Balistrieri v. United States, 497 F. Supp. 1283, 1290-91 (E.D. Wis. 1980). *Accord, e.g.*, Dobson v. Camden, 502 F. Supp. 679, 681 (S.D. Tex. 1980) (court must "avoid even the suggestion of an appearance of partiality"); Roberts v. Bailar, 625 F.2d 125, 130 (6th Cir. 1980) (court must be concerned with "appearance of impartiality"); Rice v. McKenzie, 581 F.2d 1114, 1116-17 (4th Cir. 1978) (court "cannot be influenced by [its] own faith in the integrity of a particular judge").

[58] "The attached affidavits of Joseph L. Rauh, Jr., and George Bodle are being submitted * * * pursuant to the Court's request * * *." Defendants' Response to Emergency Motions, App. at 16a.

[59] *See* Order of 2 November 1981, App. at 6a.

[60] Affidavit of Michael E. Merrill, Esq., App. at 3a.

panel acted in accordance with the strict requirement of the Judicial Code.

Judge Pregerson, as well, neglected his judicial duty in what a not-overly-cynical observer might characterize as undisguised zeal to vindicate his earlier opinion in *Seay* in one of "those cases" that "the [National Right to Work] organization [is] involved in".[61] Indeed, a judge who cannot even refrain at oral argument from voicing his obviously prejudicial concern over what organization is assisting Petitioners (and other litigants around the country) in "those cases" against compulsory unionism hardly dispels the "appearance of bias" that the earlier machinations of BRAC's attorneys inspired. To the contrary, his own conduct emphasizes that "appearance", and largely dissipates the possibility that it is "appearance" only.

Moreover, no decision that Judge Pregerson could render, adverse to Petitioners, could possibly escape the imputation of (at least) bias, howsoever honestly made. After all, Judge Pregerson's views on compulsory unionism as enunciated in *Seay* are diametrically opposed to everything this Court, the Court of Appeals for the Ninth Circuit, and the District Court in this case have said about the central issue on appeal here.[62] In this litigation, therefore, for all practical purposes, Judge Pregerson sits in ideological judgment *of himself,* as well as in legal judgment of the District Court. Under these circumstances, no reasoning individual could accept a decision adverse to Petitioners as untainted by prejudice. For, under these circumstances,

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[61] *Id.*, App. at 3a-4a.

[62] *Ante* notes 41-45 & accompanying text.

no reasoning individual could view Judge Pregerson as "a neutral and detached judge".[63]

Petitioners hope that this Court can fashion a remedy in the nature of prohibition and mandamus that provides for a fair hearing of their cases by the Court of Appeals for the Ninth Circuit. Petitioners recognize, however, that, in the present state of affairs, no remedy of that kind may be available that will exorcise the specter of impropriety now haunting these proceedings. If so, Petitioners respectfully request that this Court grant a writ of certiorari to bring the appeals before it directly. The facts certainly show, in all their shocking detail, that these "case[s are] of such imperative public importance as to justify the deviation from normal appellate procedure and to require immediate settlement in this Court".[64]

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray that this Court issue writs of prohibition and mandamus, requiring that:

> 1. the Honorable Harry Pregerson and Arthur L. Alarcon, Judges of the United States Court of Appeals for the Ninth Circuit, and the Honorable Francis C. Whelan, Senior District Judge of the United States District Court for the Central District of California, cease and desist forthwith from any and all participation in further appel-

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[63] Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); *cf.* 28 U.S.C. § 47 (1976) ("[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him").

[64] Rule 18 of the Rules of the Supreme Court of the United States.

late proceedings in the cases of *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*, No. 80-5562, and *Fails* v. *Brotherhood of Railway, Airline and Steamship Clerks*, No. 80-5603, now pending in the United States Court of Appeals for the Ninth Circuit;

2. said judges vacate their Order of 2 November 1981, denying Petitioners' Emergency Motion for Extraordinary Relief in that Court;

3. Judge Pregerson vacate his Order of 2 November 1981, denying Petitioners' Emergency Motion for Recusal in that Court; and

4. the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit, designate an *en banc* panel not including Judges Pregerson, Alarcon, or Whelan, to hear and decide the aforesaid cases.

In the alternative, Petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and bring the aforesaid cases to this Court for hearing and decision.

Respectfully submitted,

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301) 622-2804

Counsel of Record for Petitioners

17 December 1981

APPENDIX

AFFIDAVIT OF MICHAEL E. MERRILL IN SUPPORT OF PETITION FOR WRITS OF PROHIBITION AND MANDAMUS, OR ALTERNATIVELY FOR A WRIT OF CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

In re: HOWARD ELLIS, *et alia*,
Petitioners,

and

ALLEN FAILS, *et alia*,
Petitioners.

AFFIDAVIT OF MICHAEL E. MERRILL IN SUPPORT OF PETITION FOR WRITS OF PROHIBITION AND MANDAMUS, OR ALTERNATIVELY FOR A WRIT OF CERTIORARI

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, ss.

(1) I am Michael E. Merrill, chief counsel for Plaintiffs/Appellants/Cross-Appellees and class members in *Ellis* v. *Brotherhood of Railway and Airline Clerks*, No. 80-5562 and *Fails* v. *Brotherhood of Railway and Airline Clerks*, No. 80-5603, now pending as a consolidated action in the United States Court of Appeals for the Ninth Circuit.

(2) On October 26, 1981 (the first available date under the Court's procedures) I telephoned the Ninth Circuit Clerk's office to identify the panel members assigned to hear oral argument of these cases, then scheduled for the following Monday, November 2, 1981. The clerk stated that the panel would consist of Circuit Judges Pregerson and Alarcon, and Senior District Judge Whelan, sitting by designation. I inquired about the disposition of the Suggestion of Appropriateness of Hearing En Banc (Suggestion), which had been served on February 13, 1981, but not ruled upon. I was told that even though no formal order had been entered in response to the suggestion, it had been denied. When the Suggestion was prepared I had available

the Affidavit of Hugh L. Reilly In Support of Plaintiffs' Request For An *En Banc* Court. I did not file Mr. Reilly's affidavit with the Suggestion because, at the time, I had concluded that the Ninth Circuit would grant the *en banc* panel in light of the serious issues the appeals presented on their own merits, and that therefore there was no necessity of raising the collateral matters contained in the affidavit. Also, at that time I lacked the essentially corroborating information disclosed in the affidavits of Joseph L. Rauh, Jr., and George E. Bodle. However, when I learned that the Ninth Circuit had denied the Suggestion, and had selected Judge Pregerson to serve on the panel, I decided that there was no choice but to file the affidavit immediately, notwithstanding the gravity of the questions it raises.

(3) I was astonished at the inclusion of Judge Pregerson on the panel. The statements made by counsel for the Brotherhood of Railway and Airline Clerks ("BRAC") on October 23, 1979, claimed both an ability and intention to control the assignment of the panel which would hear oral argument on appeal. *See* affidavit of Hugh L. Reilly dated October 10, 1980, which is corroborated in essential respects by the affidavits of Joseph L. Rauh, Jr. and George E. Bodle dated November 1, 1981. In my view, the inclusion of Judge Pregerson on the *Ellis* and *Fails* panel demonstrated the truth of Mr. Bodle's statement that he could "control" panel selection. The statistical likelihood of Judge Pregerson appearing on that panel by random selection is, in my view, remote in the extreme.

(4) I promptly contacted Mr. Christopher W. Vasil, Acting Clerk of Court of the Ninth Circuit, and advised him of my concern that BRAC's counsel had been able to effect the panel selection he intended. I asked Mr. Vasil about procedures for seeking to disqualify the entire panel and to obtain a recusal of Judge Pregerson. He advised me to file emergency motions in both Los Angeles and San

Francisco as soon as possible. That was done, and an emergency motion for extraordinary relief and emergency motion for recusal were filed by hand (with appropriate supporting papers) in Los Angeles and San Francisco on October 28, 1981. No disposition of those motions was communicated until 1:50 p.m. on Monday, November 2, 1981, twenty minutes after argument was to have begun in the day's calendar.

(5) On Monday, November 2, 1981, we were present for the scheduled oral argument at the Pasadena City Hall, along with counsel for other cases to be heard on the calendar. Court was scheduled to begin at 1:30 p.m. but the deputy clerk twice announced that it would be delayed "because one of the judges has been held up downtown." At approximately 1:45 p.m., this same clerk came into the courtroom and called for counsel in the *Ellis* case to come up to a corner of the room. No judge was present. Counsel for Plaintiffs and for Defendants/Appellees/Cross-Appellants approached him. He handed us a set of papers* and said: "To be honest with you, this is why we are late. They [the judges] have been in there bickering about this [Plaintiffs' emergency motions]." Before concluding, the clerk repeated the comment that the judges had been "bickering" about the motions.

(6) When argument was held, Judge Pregerson served as chairman of the panel. I presented Plaintiffs' argument. During the course of the oral argument, Judge Pregerson asked me: "How many of these similar cases are pending across the country?" I replied that I did not know, but that I guessed there were fifteen or twenty. Judge Pregerson then asked me: "Are you counsel in each of those cases?" I replied that I was involved with two or three,

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* The order of November 2, 1981 by the panel denying Plaintiffs' motion for extraordinary relief and the order of Judge Pregerson dated November 2, 1981 denying Plaintiffs' motion for recusal.

but that the *Ellis* and *Fails* consolidated case "was really the only one." Judge Pregerson then asked me: "Is the organization involved in each of these cases?" I inquired as to which organization he was making reference. The response was "The National Right to Work organization." I replied that I did not know for sure, but that to my knowledge the National Right to Work Foundation is the chief organization supporting similar cases. This inquiry by Judge Pregerson was not an inquiry into the status of the law developing in those cases. It had no relevance to the issues appealed to the Ninth Circuit by either side in the instant cases. The inquiry, in my view, does have a bearing upon the reasons for Judge Pregerson's decisions in *Seay*, Mr. Bodle's intent to secure pro-union judges at the Ninth Circuit, Judge Pregerson's having chaired the appellate panel, and his refusal to rescue himself in the face of all the circumstances. It displays Judge Pregerson's persistent hostility toward these claims and the principal legal aid organization providing assistance for their prosecution.

MICHAEL E. MERRILL, Affiant

On this ..... day of December, 1981, before me, Nancy A. Walker, a Notary Public in and for said County and State, personally appeared Michael E. Merrill known to me and to be the person who executed this Affidavit and acknowledged to me that he executed the same for the purposes therein stated, and that the contents thereof are true.

Nancy A. Walker, Notary Public

My Commission Expires on 29 November 1985

ORDER OF JUDGES PREGERSON, ALARCON, AND WHELAN

2 November 1981

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5562, 80-5603

HOWARD ELLIS, et al.,
Plaintiffs/Appellants,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

ALLEN FAILS, et al.,
Plaintiffs/Appellants,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

Before: PREGERSON and ALARCON, Circuit Judges, and WHELAN,* District Judge

ORDER

(Filed November 3, 1981)

Appellants have filed a document with this Circuit which is styled "Emergency Motion of Plaintiffs/Appellants/Cross-Appellees For Extraordinary Relief" in which they request (1) the convocation of an *en banc* panel to consider the issue on appeal, (2) exclusion of the previously constituted panel from future participation in this case, and (3) referral of the facts alleged in an attached affidavit to the United States Department of Justice for investigation of any violation of federal law.

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* Hon. Francis C. Whelan, Sr. United States District Judge, Central District of California, sitting by designation.

We decline to grant any of these requests on the basis that insufficient facts have been alleged to compel such extraordinary relief.

[2] No facts have been alleged from which an inference can be drawn that the panel selected to hear this matter was selected improperly or in violation of Ninth Circuit *General Orders* 3.1-3.3 and the Ninth Circuit *Internal Operating Procedures* (2nd Ed. 1981). The Circuit Executive, without knowing which cases will ultimately be assigned to any panel, selects panels after considering the judges' availability, the number of times each judge has sat in each of the locations that year, and the number of times each judge has sat with the other judges that year. The Staff Attorneys' office independently prepares groups of case "clusters" by feeding data concerning each case into a computer. The Clerk's office then randomly matches each cluster of cases with a panel. It is only after this process is completed that the Clerk learns the identity of the panel members. We believe this procedure, when followed, is foolproof. Mr. Chris Vasil. Acting Clerk of the Court, has advised the panel that this procedure was followed in this case. Assuming for purposes of disposing of this motion that the statement attributed to Mr. Bodle was made—a fact that he denies in his affidavit filed November 2, 1981—no facts have been presented in the motion, in Mr. Reilly's affidavit, Mr. Rauh's affidavit, or Mr. Bodle's affidavit, from which it can be inferred that the procedure outlined above was not followed.

In February 1981 Appellants requested that the case be heard *en banc*. They argued that the case was of great constitutional significance, but did not attach Mr. Reilly's affidavit or even mention the alleged incident involving Mr. Bodle in their supporting papers. Pursuant to *General Order* 5.2, Judge Goodwin circulated the request to all active judges. Since no judge called for the *en banc* hearing of the case, the case, pursuant to General Order 5.2, was in due course assigned to a panel.

[3] If Appellants believed that the alleged incident constituted grounds for an *en banc* hearing of the case, that argument should have been made in the original *en banc* request. Appellants claim Mr. Bodle made his statement in October 1979, but Mr. Reilly's affidavit was not prepared until October 1980, and not filed with this court until October 28, 1981—two days after Appellants were notified of the names of the judges assigned to hear the case and five days before the scheduled oral arguments. If Appellants are dissatisfied with the decision of the panel they can, of course, request a rehearing *en banc* at that time.

The statement by an attorney insinuating that he or she has the ability to influence the composition of the panels or the outcome of this court's decisions is highly unethical. Counsel are undoubtedly aware that the California State Bar investigates attorney misconduct. We suggest that they refer any complaints to the appropriate disciplinary committee.

Dated: Nov. 2, 1981

/s/ Harry Pregerson
United States Circuit Judge

/s/ Arthur L. Alarcon
United States Circuit Judge

/s/ Francis C. Whelan
United States District Judge

MEMORANDUM FROM CHRISTOPHER W. VASIL TO JUDGES PREGERSON, ALARCON, AND WHELAN

2 November 1981

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM

To: Judges Pregerson, Alarcon and Whelan

FROM: Christopher W. Vasil (CWV)

DATE: November 2, 1981

RE: *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* Nos. 80-5562 and 80-5603

With regard to the procedures for calendaring the above-captioned cases for oral argument, please be advised that I have reviewed the procedures involved in setting the November calendar and can find no deviation from the standard "blind assignment" system for assigning cases to panels. The panel assignments were prepared in the Office of the Circuit Executive. The case clusters were prepared in the Staff Attorney's Office. The Clerk's Office then randomly assigned the case clusters to the panels. The only panel change that occurred after the initial assignment of these cases was the replacement of Judge Wilkins by Judge Whelan.

CWV:grh

c: Judge Browning

ORDER OF JUDGE PREGERSON

2 November 1981

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5562, 80-5603

HOWARD ELLIS, et al.,
Plaintiffs/Appellants,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

ALLEN FAILS, et al.,
Plaintiffs/Appellants,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

ORDER

(Filed November 3, 1981)

Appellants contend that I should recuse myself from this case because, as a district court judge, I ruled on similar issues in an action involving some of the same counsel, but entirely different plaintiffs and defendants. This, they assert, means I would not be able to rule on the instant case in an impartial manner. This claim is without merit.

Under 28 U.S.C. § 455, a judge "shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The test is whether, given all the circumstances, there are reasonable grounds

for finding that the judge could not try the case fairly, either because of the appearance or actual existence [2] of bias or prejudice. *United States* v. *Conforte*, 624 F.2d 869 (9th Cir. 1980). For example, a judge must recuse himself if either he or a close relative is a party, a witness, or an attorney in the action, or has a substantial interest in the action. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 113 (7th Cir. 1977). The term "substantial interest" refers to a pecuniary or beneficial interest rather than any personal concern or opinion about the issues presented or the facts of the case. *In re Grand Jury Investigation*, 486 F.2d 1013 (1973), *cert. denied* 417 U.S. 919.

Appellants essentially assert, however, that a judge who once expresses an opinion on a given legal issue is thereafter precluded from hearing any case in which that issue is addressed. This is not the law. For example, Justices Black and Douglas announced their belief, in *Roth v. United States*, 354 U.S. 476, 513-14 (Douglas and Black, J.J. dissenting) that the First Amendment absolutely barred obscenity prosecutions. Appellants' argument implies that those justices should have recused themselves every time a new obscenity case came to the Court. Yet the judges continued to participate in such cases and to reiterate the views they had expressed in *Roth*. *See, e.g., Miller v. California*, 413 U.S. 15, 37-47 (1973) (Douglas, J., dissenting); *United States v. 37 Photographs*, 402 U.S. 363, 379-88 (1971) (Black and Douglas, J.J., dissenting); *Ginzburg v. United States*, 383 U.S. 463, 476-82, 482-92 (1966) (Black, J., dissenting and Douglas, J., dissenting). *See also Laird v. Tatum*, 409 U.S. 824 (1972). Respondents in that action asked Justice Rehnquist to recuse himself. They argued that he was biased because he had testified before a Senate [3] Subcommittee as an expert witness and expressed, on behalf of the Justice Department, a view of the law contrary to that of the *Laird* respondents, whose case was then pending in the Court of Appeals. In a memorandum explaining his decision not to recuse himself, Justice

Rehnquist pointed out that: Justice Black authored the Fair Labor Standards Act; Justice Frankfurter wrote extensively in the field of labor law prior to his Supreme Court appointment and played an important role in the drafting of the Norris-LaGuardia Act; and Justice Jackson participated in a decision raising exactly the same issue that he had decided as Attorney General. Yet none of them recused themselves from cases involving areas in which they had previously advocated certain positions.

It is also relevant to note that a Ninth Circuit judge is not precluded from sitting on an *en banc* panel after serving as a member of the original three-judge panel. Rule 25, *Rules of the United States Court of Appeals for the Ninth Circuit*. In such cases, a judge properly passes on the merits of the exact claim two times.

During my tenure on the district court I authored ninety-six published opinions and rendered decisions in thousands of cases. I do not believe that I am compelled to disqualify myself whenever I am confronted with similar issues. Of course, we are all aware that members of this court are bound by Ninth Circuit and Supreme Court precedent. Therefore, Appellant's request that I recuse myself from participation in the instant case is DENIED.

Dated: November 2, 1981

/s/ Harry Pregerson
HARRY PREGERSON
United States Circuit Judge

DEFENDANTS' RESPONSE TO EMERGENCY MOTIONS*

* Certificate of Service omitted in printing.

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Attorneys for Defendants-Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-5562 & 80-5603
D.C. #CV73-113/73-118

SOUTHERN CALIFORNIA

DEFENDANTS' RESPONSE TO EMERGENCY MOTIONS

HOWARD ELLIS, et al., *Plaintiffs,*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., *Defendants.*

ALLEN FAILS, et al., *Plaintiffs,*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al., *Defendants.*

[2] DEFENDANTS' RESPONSE TO EMERGENCY MOTIONS

1. The attached affidavits of Joseph L. Rauh, Jr. and George Bodle are being submitted this morning pursuant to the Court's request transmitted to counsel by the Clerk's office.

2. In addition to submitting the affidavits, we respectfully suggest to the Court that, on the question of recusal, appellate judges are frequently required to rule on issues related in some way or other to issues which were earlier before them in other cases when they served as judges of the district court. For this reason and on the facts set forth in the affidavits attached hereto, we respectfully oppose

plaintiffs' latest dilatory tactic in the form of the pending emergency motions.

Respectfully submitted,

/s/ Joseph L. Rauh, Jr.
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1001 Connecticut Ave., N.W.
Washington, D.C. 20036

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815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Defendants-Appellees/ Cross-Appellants

[3] AFFIDAVIT OF JOSEPH L. RAUH, JR.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, SS.

I, JOSEPH L. RAUH, JR., being first duly sworn, deposes and says:

1. Since September 1975, I have been the Chief Counsel for the defendants in this case.

2. No counsel on our side of this case has made any effort at any time, directly or indirectly, to affect the composition of the appellate panel, and so far as I can determine no one has made any such effort. I assume that the Court has already ascertained from the Clerk's office that the panel was chosen in this case in the normal course and with no outside interference of any kind.

3. I do not have a clear recollection of any conversation with Mr. Bodle on October 23, 1979, but I do recollect that at some time, while the case was still in the District Court, Mr. Bodle stated that he was acquainted with certain of the judges on this Court and that if they became aware of the case's existence and importance, they might wish to participate in its consideration. I made it clear that I would not countenance any contact with the Court or its staff. Mr. Bodle agreed completely. He has assured me that neither he nor, to his knowledge, has anyone else made any contact of any kind with the Court or the office of the Clerk. Actually, Mr. Bodle has had no connection whatsoever with this case in **[4]** this Court other than having his firm's name carried as local counsel.

/s/ Joseph L. Rauh, Jr.
JOSEPH L. RAUH, JR.

Subscribed and sworn to before me
this 1st day of November, 1981.

/s/ Irene Shaffer
Notary Public in and for said State.
[SEAL]

[5] **AFFIDAVIT OF GEORGE E. BODLE**

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, SS.

I, GEORGE E. BODLE, being first duly sworn deposes and says:

1. I have not made any effort, at any time, directly or indirectly, to influence the composition of the appellate panel to hear this case.

2. Although my firm played an active role in this case in the District Court and the firm's name has been carried as local counsel during the appeal, I have had no involvement in the case during the appellate stage. Indeed, until Friday, October 30, 1981 when Laurence Gold (one of the counsel in the case) called to advise me of the Court's request for this affidavit, I did not know the case had been set for oral argument nor did I know of the composition of the panel assigned to hear the case.

3. I am not personally acquainted with any of the judges who have been assigned to hear this case on appeal. I have never had a personal conversation on any subject with any one of them. Of the three, I have appeared only before Judge Pregerson on perhaps three occasions when he was sitting in the District Court.

4. On October 23, 1979, I do remember stating to Mr. Rauh that based on my experience there were judges on this Court who were unsympathetic to unions and judges who were sympathetic. I also stated that there were some judges on the Court whom I had [6] known for many years, for whose ability and judicial temperment I had the highest regard, and who if they knew of the case's importance might seek to sit on the appellate panel. Mr. Rauh responded that it would be improper to provide that information to a sitting judge and that there would be no effort to do so. I agreed. I did not make the statement attributed

to me in the affidavit on file herein or any statement from which such a connotation could be derived.

/s/ George E. Bodle
GEORGE E. BODLE

Subscribed and sworn to before me
this 1st day of November, 1981.

/s/ Irene Shaffer
Notary Public in and for said State.
[SEAL]

EMERGENCY MOTION OF PLAINTIFFS/ APPELLANTS/CROSS-APPELLEES FOR EXTRAORDINARY RELIEF*

27 October 1981

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* Certificate of Service omitted in printing.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5562/No. 80-5603

HOWARD ELLIS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

ALLEN L. FAILS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

EMERGENCY MOTION OF PLAINTIFF/APPELLANTS/ CROSS-APPELLEES MOTION FOR EXTRAORDINARY RELIEF

MERRILL AND SCHULTZ,
Attorneys at Law

RAYMOND J. LAJEUNESSE, JR., ESQ.
HUGH L. REILLY, ESQ.
National Right to Work Legal Defense Foundation

By Michael E. Merrill
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Attorneys for Plaintiffs/ Appellants/Cross-Appellees

EMERGENCY MOTION OF PLAINTIFF/APPELLANTS/ CROSS-APPELLEES FOR EXTRAORDINARY RELIEF

The Plaintiffs below (Plaintiffs/Appellants/Cross-Appellees here) move for extraordinary relief of the following kinds: (1) convocation of an en banc panel to consider the issue on appeal;[1] (2) exclusion of the presently constituted panel from future participation in the case;[2] and (3) referral of the facts alleged to the United States Department of Justice for investigation of any violations of federal law. They do so with the certain knowledge that they are entitled to appellate review of the issues by a panel which is free from actual bias,[3] or the appearance of bias,[4] and that the facts alleged here are such that a reasonable man would necessarily question the present panel's impartiality.[5]

[2] THE FACTS RELATED IN THE ATTACHED AFFIDAVIT, A REASONABLE PERSON MIGHT CONCLUDE, STATE BRAC'S COUNSELS' INTENT TO CONTROL SELECTION OF THIS COURT'S PANEL

The facts related in the Affidavit attached hereto as Exhibit A, show that one of BRAC's attorneys of record, Mr. George Bodle, stated to others, including another of BRAC's attorneys, Mr. Joseph L. Rauh, that he (Bodle)

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[1] Plaintiffs had sought an en banc panel to avoid the profound difficulties now raised by this motion, Suggestion Of Appropriateness Of Hearing En Banc, served February 13, 1981.

[2] The facts related in the attached affidavit, the known prejudgment of the issues by one of the present panelists, and Plaintiffs' right to an impartial panel require this result.

[3] *In re Murchison*, 349 U.S. 133, 136 (1955).

[4] 28 USC § 455 (1976).

[5] SCA Services, Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977).

thought he "could control the panel [they] get at the 9th Circuit." Mr. Rauh's response, also related in the Affidavit was that "he would be in constant touch with [Mr. Bodle's] office." Those facts alone raise substantial doubts about the present panel's impartiality, and should be investigated, as outlined below. But there is more.

JUDGE PREGERSON, ONE OF THE THREE PRESENT PANELISTS, WAS TRIAL JUDGE IN *SEAY v. INT'L. ASS'N. OF MACHINISTS*, A CASE IN WHICH HE WAS TWICE REVERSED BY THIS COURT

The case of *Seay v. Int'l Ass'n of Machinists,*[6] was filed in U.S. District Court in the Central District of California. That case involved the constitutional interpretation of § 8(a)(3) of the National Labor Relations Act, which is analogous to § 2 Eleventh of the Railway Labor Act, the provision to be interpreted here. Several of the attorneys are the same and the dominant issue is the same: What is the constitutionally correct definition of "collective bargaining, contract administration, and grievance adjustment."

[3] Judge Pregerson in *Seay* selected an expansive definition which would include within its ambit virtually anything the Machinists Union does, including outright political activity.[7] His views are diametrically opposed to those of the trial court in the instant case.[8] Here, the trial court excluded from "collective bargaining" certain itemized union activities including political activity.[9] Judge Pregerson's views, expressed in *Seay,* are flatly contrary to those

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[6] No. 67-1394-HP (filed September 22, 1967).

[7] Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 761 n. 7 (C.D. Cal. 1973).

[8] Judge Nielsen's judgment is reported at 91 L.R.R.M. 2336 (January 21, 1976).

[9] *Id.* at 2341-42.

of the trial court. By participating on the panel, Judge Pregerson would be sitting in judgment on himself as well as the trial court. A reasonable person might conclude that Judge Pregerson would approach that assignment with less than the "detached impartiality" the law requires of him.[10]

Moreover, Judge Pregerson's views were twice reversed by this Court.[11] His first decision disposed of a number of issues, including: (1) the scope of allegations in the complaint; [4] and (2) exhaustion, which illustrates his approach to this kind of litigation. Both were decided against the *Seay* plaintiffs.

In review this Court simply must compare the actual circumstances with Judge Pregerson's reported findings:

On The Scope Of The Complaint

Judge Pregerson's Finding	*9th Circuit's Determination*
"The trial court interpreted the allegations of the complaint narrowly as stating only a claim that the defendant union failed to use the agency fee payments for purposes necessary and germaine to collective bargaining."	"The complaint as we view it went far beyond such limited claims. It specifically asserted that proceeds from funds exacted from the plaintiffs under the terms of the agreement were used in substantial amounts for political and ideological purposes contrary to plaintiffs' wishes and in derogation of their constitutional rights
"The trial court further stated that there had been	

[10] "[T]he judge has the responsibility of insuring that his presence on the bench will . . . have the appearance of detached impartiality." *In re* Horton, 621 F.2d 968, 970 (9th Cir. 1980).

[11] Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970); Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976).

"no charge that the union failed fairly and impartially to represent the plaintiffs either in collective bargaining with defendant company or in its enforcement of the resulting collective bargaining agreement." [12]

under the First, Fifth and Ninth Amendments." [13]

• • • •

"The District court treated this controversy as an ordinary unfair labor practice case arising under 29 U.S.C. §§ 158(a)(3) and 158(b)(2), and involving a dispute 'over fees payable under a union security provision.' The court relied upon N.L. R.B. [5] v. Technicolor Motion Picture Corp., 248 F.2d 348 (9th Cir. 1957), and Radio Officer's Union v. N.L. R.B., 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954)." [14]

"We do not regard those cases as controlling. In N.L. R.B. v. Technicolor, an employee did not pay his initiation fee for union membership within thirty days after a union security contract became effective. He subsequently tendered [5] payment, but was discharged by his employer. The issue was whether the discharge was proper. Upon a complaint lodged by the employee, the case was handled through standard NLRB procedures without the issue of initial federal court jurisdiction or pre-emption being asserted. There was no question raised concerning improper use of exacted agency fees.

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[12] Seay v. McDonnell Douglas Corp., 427 F.2d 996, 999 (9th Cir. 1970).

[13] *Id.*

[14] *Id.*

Radio Officers, supra, likewise raised questions of the interpretation and effect of a collective bargaining agreement. It also was handled through regular Board procedures with no question being raised as to pre-emption or improper use of funds." [15]

Thus, this Court determined that Judge Pregerson ignored obvious allegations in the complaint and utilized inapplicable cases to dismiss it.

On Exhaustion

Judge Pregerson's Statement	*9th Circuit's Finding*
Plaintiffs have shown no attempt to utilize, let alone exhaust, the grievance and arbitration procedures afforded in the agreement.[16]	Here, there is evidence that several appellants attempted to exhaust these procedures. Contained in the record are the verified answers to interrogatories of a number of the appellants in which they [6] state under oath that they did make objection both orally and in writing. Their objections went unheeded. An employee is not required to do more than that.[17]

[15] *Id.*

[16] Seay, *supra* note 6 (Memorandum and Order Dismissing Complaint and Action, p. 5. Entered May 27, 1968).

[17] Seay, *supra* note 12 at 1001.

Thus, this Court determined that Judge Pregerson also ignored evidence in the record in dismissing the complaint.

Subsequent to proceedings in this Court, *Seay* was remanded. On remand, Judge Pregerson again evinced a distaste for Plaintiffs' claims, the record, and this Court's interim decision.

Judge Pregerson's Finding On Remand	*This Court's Prior Determination*
"In my view, political activities are germane to collective bargaining in many ways."	"A provision in the collective bargaining agreement *authorizing* the expenditure of agency fees for political uses would immediately run afoul of the Congressional intent designated in *Street* and the express holding in both *Street* and *Allen*." [19]
"The IAM intends to employ a broader definition of political activity than that contemplated by the court's order . . . ." [18]	

Thus, in *Seay* on remand, Judge Pregerson stated a rule of law in defiance of the one this Court had articulated in the precise case. Moreover, his rule, he was forced to concede, was even *less* protective of Plaintiffs than the Defendants would have been, had they been judges in their own case.[20] He also concluded that a rebate plan, then very recently enacted by the union to [7] defeat Plaintiffs' claims, was on its face a defense to the complaint.[21] This court again disagreed, and was again forced to remand the case.[22]

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[18] Seay, *supra* note 7 at 761 n. 7.

[19] Seay, *supra* note 12, at 1000-1.

[20] Seay, *supra* note 7 at 762 n. 7 continued.

[21] Seay, *supra* note 7 at 763.

[22] Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1132 (9th Cir. 1976).

The Plaintiffs are, as would be other litigants, entitled to a panel free from prejudice,[23] or the appearance of prejudice.[24]

The applicable statutes so provide:

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.[25]
>
> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein.[26]

The Code of Judicial Conduct so provides.

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .[27]

[8] Case law, too, is equally unequivocal. In such cases, the "appearance of impartiality is virtually as important as the fact of impartiality."[28] The issue is "whether another, not knowing whether the judge is actually impartial, might reasonably question his impartiality on the basis of

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[23] Murchison, *supra*, note 3.

[24] *Supra*, note 4.

[25] 28 U.S.C. § 47.

[26] 28 U.S.C. § 455.

[27] Am. Jur.2d Desk Book, Item No. 90, Cannon 3, § C(1).

[28] Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977).

all of the circumstances." [29] And that issue is to be determined, not from the standpoint of the judge, and not from that of a litigant, but rather the mind of the reasonable man." [30] And disqualification should occur if that "reasonable man", knowing all of the circumstances, "would harbor doubts about the judge's impartiality." [31]

In the case of an appellate justice sitting in judgment on issues he participated in below, case law is equally strong. In *Swann v. Charlotte-Mecklenburg Board of Education*,[32] the Court said, "[s]uch an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless a published decision." [33] The same policy considerations of concern in such [9] cases are present here, and must be addressed, whether Judge Pregerson tried the instant case or *Seay*.

CONCLUSION

The facts recounted in the Affidavit which is Exhibit A hereto; the decisions made by Judge Pregerson in a case substantially the same as this one, which were in defiance of this Court's own decisions; and the policy considerations set forth in 28 U.S.C. §§ 47 and 455, require that this Emergency Motion for Extraordinary Relief be granted. In acting upon it, this Court should convene an en banc panel, exclude the presently constituted panel from future participation in the case, and refer the facts alleged to the

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[29] Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978).

[30] United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).

[31] Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir. 1980).

[32] 431 F.2d 135 (4th Cir. 1970).

[33] *Id.* at 137, quoting with approval from an address to the American Bar Association.

United States Department of Justice, for investigation of any violations of federal law. Those actions would tend to restore the impression, totally absent without them, that the Plaintiffs/Appellants/Cross-Appellants will receive an impartial reception before an unbiased panel.

DATED: October 27, 1981

Respectfully submitted,

MERRILL AND SCHULTZ,
Attorneys at Law

Hugh L. Reilly, Esq.
Raymond J. LaJeunesse, Jr.
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

By /s/ Michael E. Merrill
MICHAEL E. MERRILL

Exhibit "A"

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Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-5562 & 80-5603
D.C. #CV73-113/73-118
SOUTHERN CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

ALLEN L. FAILS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

AFFIDAVIT OF HUGH L. REILLY IN SUPPORT OF PLAINTIFFS' REQUEST FOR AN *EN BANC* COURT

[11] I, Hugh L. Reilly, am over twenty-one years of age, am competent to testify under the laws of the State of California and the Commonwealth of Virginia, and I have personal knowledge of the contents of this Affidavit.

I am an attorney admitted to practice in Maryland, the District of Columbia, and before the United States Supreme Court. I have been admitted *pro hac vice* in a number of state and Federal District courts in the United States. And I have been admitted *pro hac* in the Southern District of California, for the purpose of assisting lead counsel for the plaintiffs in the consolidated cases of *Ellis v. Bhd. Ry. & Airline Clerks,* No. 73-113-N (Filed March 20, 1973) and *Fails v. Bhd. Ry. & Airline Clerks,* No. 73-118-N (Filed March 23, 1973), now on appeal to this Court, and bearing Nos. 80-5562 and 80-5603, respectively.

On October 23, 1979, I was in the courtroom of Judge Leland Nielsen for argument on post-trial review. The courtroom is arranged with plaintiffs' and defendants' counsel tables side-by-side, but separated by perhaps twelve feet. Each counsel table has three, or more, chairs, and is about twelve feet long. A rail, with a center gate, separates counsel tables from spectator seating.

On that occasion Michael E. Merrill and I represented the plaintiffs. Joseph Rauh and Mary Levy represented the defendants. A person then unknown to me, but later identified by the court as George Bodle (co-counsel for the [12] defendants), was present in the courtroom, but did not sit at counsel table for the argument.

On a recess, Mr. Bodle joined other defendants' counsel at counsel table. Mr. Rauh was standing at the end of the table closest to plaintiffs' counsel, but facing away from them. Mr. Bodle and Ms. Levy were at the chairside of the other end of defendants' table, facing Mr. Rauh.

At that point, Mr. Bodle said, addressing Mr. Rauh, "I think I can control the panel we get at the 9th Circuit." Mr. Rauh then turned and looked at Plaintiffs' counsel, and

walked around the front to the other end of the table. The defendants' attorneys huddled together in discussion, and, when they broke from the huddle, Mr. Rauh said, "We will be in constant touch with your office."

/s/ Hugh L. Reilly
HUGH L. REILLY

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX, SS.

On this 10th day of October in the year 1980, before me, Lorraine A. Colson, a Notary Public and in for said commonwealth, personally appeared Hugh L. Reilly known to me to be the person who executed this Affidavit and acknowledged to me that he executed the same for the purposes therein stated, and that the contents thereof are true.

/s/ Lorraine A. Colson
LORRAINE A. COLSON, Notary Public

My Commission Expires on December 5, 1983.

EMERGENCY MOTION FOR RECUSAL*

27 October 1981

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* Certificate of Service omitted in printing.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5562/No. 80-5603

HOWARD ELLIS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

ALLEN L. FAILS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

EMERGENCY MOTION FOR RECUSAL

MERRILL AND SCHULTZ,
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National Right to Work Legal
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By Michael E. Merrill
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Suite 345
San Diego, CA 92108

Attorneys for Plaintiffs/
Appellants/Cross-Appellees

[2] **MOTION FOR RECUSAL**

The Plaintiffs/Appellants/Cross-Appellees move, pursuant to 28 U.S.C. §§ 47 and 455, that Judge Harry Pregerson recuse himself from participation in this case for the following reasons:

Those set forth in Plaintiffs/Appellants/Cross-Appellees' Emergency Motion for Extraordinary Relief, a copy of which is annexed hereto and incorporated by reference.

DATED: October 27, 1981

Respectfully submitted,

MERRILL AND SCHULTZ,
Attorneys at Law

Hugh L. Reilly, Esq.
Raymond J. LaJeunesse, Jr.
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

By /s/ Michael E. Merrill
MICHAEL E. MERRILL

DECLARATION OF MICHAEL E. MERRILL IN SUPPORT OF EMERGENCY MOTION OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES FOR EXTRAORDINARY RELIEF AND EMERGENCY MOTION FOR RECUSAL

28 October 1981

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Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 80-5562 & 80-5603
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SOUTHERN CALIFORNIA

HOWARD ELLIS, et al.,
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vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

ALLEN L. FAILS, et al.,
Plaintiffs/Appellants/Cross-Appellees,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

DECLARATION OF MICHAEL E. MERRILL IN SUPPORT OF EMERGENCY MOTION OF PLAINTIFFS/APPELLANTS/ CROSS-APPELLEES FOR EXTRAORDINARY RELIEF AND EMERGENCY MOTION FOR RECUSAL

[2] Pursuant to Rule 6(h) of the Rules of the United States Court of Appeals for the Ninth Circuit, Plaintiffs/ Appellants/Cross-Appellees submit the following declaration in support of their emergency motion for extraordinary relief and their emergency motion for recusal and state as follows:

1. I am Michael E. Merrill, a partner in the law firm of Merrill and Schultz, 4420 Hotel Circle Court, San Diego, California, 92108, (714) 293-3722, and I am one of the attorneys representing plaintiffs in the above referenced matter. Plaintiffs are also represented by Raymond L. LaJeunesse, Jr. and Hugh L. Reilly of the National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia 22160, (703) 321-8510. Defendants/Appellees/Cross-Appellants are primarily represented by Joseph L. Rauh, Jr., Rauh, Silard and Lichtman, 1001 Connecticut Avenue, N.W., Washington, D.C. 20036 (202) 331-1795, and Laurence Gold, AFL-CIO - Suite 808, 815 16th Street, N.W. Washington, D.C. 20006, (202) 637-5390.

2. In their motion for recusal and motion for extraordinary relief, plaintiffs have requested that the panel consisting of Judge Pregerson, Judge Alarcon, and Judge Whelan be excluded from any participation in the above referenced matters and that an en banc panel be convened to consider the issues raised in these appeals because of a substantial question as to the present panel's impartiality. Plaintiffs had previously requested that the appeal be considered by an en banc panel and was not aware that its suggestion for an en banc consideration had been rejected and that the appeals would be considered by the presently constituted panel until Monday, October 26, 1981. Oral ar-

gument [3] is currently scheduled to be heard on Monday, November 2, 1981.

3. None of the grounds advanced in either motion has been submitted to the United States District Court for the Southern District of California. Submitting the issues raised in these motions to the United States District Court for the Southern District of California would be inappropriate as that Court would not have jurisdiction to enter the relief requested.

4. A copy of each motion and a copy of this declaration is being express mailed to opposing counsel today.

5. At 9:00 a.m. PST, I contacted attorney Rauh by telephone and advised him that their motions were being filed today, and that he and co-counsel would be served by express mail.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of October, 1981, in San Diego, California.

/s/ Michael E. Merrill
MICHAEL E. MERRILL

SUGGESTION OF APPROPRIATENESS OF HEARING EN BANC*

12 February 1981

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* Certificate of Service omitted in printing.

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Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
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Defendants/Appellees/Cross-Appellants.

ALLEN L. FAILS, et al.,
Plaintiffs/Appellants/Cross-Appellees

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants/Appellees/Cross-Appellants.

SUGGESTION OF APPROPRIATENESS OF HEARING EN BANC

[2] To The Honorable Judges Of The United States Court Of Appeals For The Ninth Circuit:

Pursuant to Rule 35(b), Federal Rules of Appellate Procedure, Plaintiffs/Appellants/Cross-Appellees (hereinafter "Plaintiffs") hereby respectfully suggest that the above-entitled proceeding is appropriate for consideration by a limited en banc panel of the judges of this Court. The basis of this suggestion is that the cause before the Court involves questions of exceptional importance. (Federal Rule of Appellate Procedure 35(a)(2)) The hearing of a case en banc is specifically authorized by statute when ordered by a majority of the circuit judges of the circuit who are in regular active service [28 U.S.C. § 46(c) (1978)].

MEMORANDUM OF POINTS AND AUTHORITIES

The hearing of important cases by a limited en banc panel of judges of the Ninth Circuit is not without precedent. As recently as August, 1980, this Court granted a rehearing before a limited en banc panel of eleven circuit judges. *Associated Builders and Contractors v. NLRB (Local 701, Operating Engineers)*, 609 F.2d 1341 (9th Cir. 1979), *rehearing granted*, 105 L.R.R.M. 2496 (9th Cir., August 29, 1980).

The practice of hearing cases of exceptional importance before an en banc panel is well established. In *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893 (2d Cir. 1963) (en banc), Chief Judge Lombard set forth the requirements for invoking the en banc procedure on the basis of the significance of the case. Foremost among the requirements was that "the case [involve] an [3] issue likely to affect many other cases." *Id.* at 894.* This situation occurs

* Numerous cases are pending across the country, in both public and private employment sectors, raising issues decided in the sum-

when the issues are "of sufficient concern to enough litigants who are or may become involved in similar situations so that the even-handed administration of justice will be benefited by a decision of the entire court." *Id.*

The instant case certainly is one which involves exceptionally important issues affecting millions of workers subjected to compulsory unionism throughout the United States. For many years, employees have had their rights of free association and free expression guaranteed by the First Amendment to the United States Constitution summarily denied by the extraction of compulsory union dues and fees for political, ideological and other non-collective bargaining purposes. Employees have been forced to accept this prior restraint of their First Amendment rights as a requirement of their employment under applicable collective bargaining agreements. The rulings on the constitutional claims of the *Ellis* and *Fails* plaintiffs will directly affect all employees [4] working for employers subject to the jurisdiction of both the Railway Labor Act [45 U.S.C. Section 151, *et seq.*] and the National Labor Rela-

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mary judgment and final judgment granted below. Those cases have been pending for numerous years, and they are characteristically not susceptible to settlement. In many instances, they have traversed matters of appeal, and it is clear that this situation will persist. Each of those cases will be substantially affected by the decision reached by this court, and there is every likelihood that numerous additional cases will be filed between the present date and the rendition of this court's decision and, of course, those cases will similarly be subject to substantial influence by this court's decision). The other decisions include: *Abood v. Bd. of Educ.*, 341 U.S. (1977) (on remand); *Ball v. City of Detroit*, 84 Mich.App. 383, 269 NW 2d 607 (1978) (on remand); *Browne v. Milwaukee Bd. of School Directors*, 83 Wisc.2d 316, 98 L.R.R.M. 2574 (1978) (on remand); *Beck v. C.W.A.*, 468 F.Supp. 87, 468 F.Supp. 93 (1979) (before Special Master); *Greenfield School Comm. v. Greenfield Educ. Ass'n.*, 79-80 CCH PBC ¶ 37023 (Mass. Sup. Ct. July 31, 1980) (on appeal).

tions Act [29 U.S.C. Section 141, *et seq.*] *Seay v. International Association of Machinists*, 427 F.2d 996, 1003 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973), *rev'd.*, 533 F.2d 1126 (9th Cir. 1976). Thus, these constitutional violations are of the utmost consequence.

As early as 1974, the significance of this case was clearly pointed out in court during an exchange between Judge Nielsen of the Federal District Court of the Southern District of California and the chief counsel of the Defendants at that time, Joel Klevens. During the hearings on Defendants' motion for summary judgment, Mr. Klevens addressed the court on the issue of the union's burden to account for all the expenditures of dues and fees for each member of a bargaining unit.

> Mr. Klevens: It's an almost impossible accounting situation, and there's not a union in the United States that has a system like that.
>
> The Court: Well, maybe it's time they got them.
>
> Mr. Klevens: And there's no case in the United States which indicates the unions have to adopt that kind of an accounting procedure.
>
> The Court: Maybe we'll make one.
>
> Mr. Klevens: You mean in this case, your Honor?
>
> The Court: Yes.

(Transcript of Hearing, dated October 6, 1975 at 9, Lines 14-23, attached hereto as Exhibit A.) Similarly, the fact that the *Ellis* and *Fails* cases were confronting important issues which had been [5] addressed, but not yet fully answered, by the Supreme Court was emphasized by the following dialogue between Judge Nielsen and the present chief counsel for the Defendants, Joseph Rauh.

> Mr. Rauh: Turning now to expenditures beyond political causes, plaintiffs are taking your Honor out on

> an uncharted sea . . . it's not only uncharted sea they're asking you to go out on, but an unprecedented one because, if your Honor please, in twenty-five years of Union shop and transportation industry and forty years of the union shop under NLRA, no Court has ever held any expenses rebatable except for political causes. There is no precedent. Not only is the sea uncharted. This [sic] is a place where no Court has ever said you'll get back beyond political causes.
>
> The Court: But the Supreme Court sure left a gray area there, didn't they?
>
> Mr. Rauh: I think so, your Honor. I'm coming to that. You're absolutely right. There are a lot of doctrines that cause the courts trouble.

(Transcript of Hearing, dated January 12, 1976 at 24, Lines 14-25, and 25, Lines 1-11, attached hereto as Exhibit B.)

Case confronting fundamental issues in the "gray area" left by other court decisions are the types of cases appropriate for en banc or limited en banc consideration. Judge Kaufman in *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972), expressed the view that persistent legal problems involving fundamental rights are of the type that merit en [6] banc determination.

> We voted to hear the initial argument of this appeal *en banc*, a procedure we reserve for extraordinary circumstances, so that we might give plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems . . . The elaborate opinion and order below raise important questions concerning the federal constitutional rights of state prisoners, which neither Supreme Court precedent nor our own past decisions have answered. The sparse authority from other courts is for the most part either inconclusive or conflicting.

Id. at 180-181.

In the instant case, the District Court granted Plaintiffs summary judgment on the issue of liability, holding that the Defendants' expenditure of Plaintiffs' dues and fees for non-collective bargaining purpose was a breach of the union's duty of fair representation. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 91 L.R.R.M. 2339 (S.D. Cal. 1976). Statements made by union spokesmen throughout the country evidence the magnitude and immediate impact of that decision. Stephen S. Schlossberg, who at that time was the general counsel of the United Auto Workers, stated: "No union can exist on those [the summary judgment's] terms. The decision has a tremendous effect on all unions and on the quality of life in the country because of the way it restricts the role unions can play in working for social change." BUSINESS WEEK, February 16, 1976, at 26. Alexander Barkan, National Director of COPE, the AFL-CIO's political action and education committee, stated:

> I break out in a cold sweat thinking what this Nixon-Ford Supreme Court will do with that case when it inevitably is appealed to that level in a year or two. Our lawyers tell us the labor movement as we know it could not exist under [7] that decision.
>
> Coming to this convention, putting out a union newspaper, and certainly contributions to political campaigns will be outlawed.

Chicago Sun-Times, September 13, 1978, at 4. Defendants' chief counsel, Joseph Rauh, stated that the ruling, if upheld, "would in effect repeal the union shop." Wall Street Journal, January 27, 1976.

Accordingly, Defendants sought an immediate appeal from the summary judgment. In their moving papers to this Court, Defendants described the decision as "precedential."

> At the very least this ruling fills the gap left by the United States Supreme Court in *Street* and *Allen;* and, if BRAC is correct, the decision violates the principles set forth by the United States Supreme Court. Therefore, because the decision below is one of first impression on matters of great importance—a "landmark decision" as plaintiffs' press releases have described it—the decision is one on which there is substantial basis for difference of opinion.

Petitioners-Defendants' Petition for Permission to Appeal, dated April 23, 1976 at 9. More recently, in their opposition to Plaintiffs' motion for an extension of time for filing their brief to this Court, Defendants asserted:

> [T]his is possibly the most important labor case in the courts today and should be resolved by this Court, and likely the Supreme Court, at the earliest possible time. If in fact the District Court is correct, millions of workers are paying union dues without knowing of their option to obtain substantial refunds.

Defendants' Verified Opposition to Plaintiffs' Motion for a Second and Unprecedented Extension of Time, dated October 20, 1980 at 5. Clearly, the District Court's decision in *Ellis* presents this Court with constitutional and statutory questions of exceptional [8] importance. The Third Circuit stated that a case which, on appeal, "squarely meets the constitutional issue" is one that is appropriate for en banc consideration. *United States v. Anderson,* 461 F.2d 739 (3d Cir. 1972).

CONCLUSION

This appeal involves fundamental issues of transcendent importance that will affect millions of workers throughout the country. It is therefore appropriate for consideration by a limited en banc panel.

WHEREFORE, Plaintiffs respectfully request that the honorable judges of the United States Court of Appeals for the Ninth Circuit grant this petition and order that the above-entitled proceeding be heard by a limited en banc panel of the Court.

DATED: February 12, 1981

MERRILL AND SCHULTZ,
Attorneys at Law

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HUGH L. REILLY, ESQ.
National Right to Work Legal
Defense Foundation

By /s/ Michael E. Merrill
MICHAEL E. MERRILL

Attorneys for Plaintiffs/
Appellants/Cross-Appellees

Exhibit "A"

[9] IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE LELAND C. NIELSEN, JUDGE PRESIDING

Civil No. 73-113-N (Ellis)
Civil No. 73-118-N (Fails)

HOWARD ELLIS, et al, ALLEN FAILS, et al, *Plaintiffs,*

v.

BROTHERHOOD OF RAILWAY, et al, *Defendant.*

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California
Monday, November 11, 1974

APPEARANCES:

For the Plaintiffs:

NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
By: MICHAEL E. MERRILL, Staff Atty.
and RAYMOND J. LAJEUNESSE, JR.
1990 M Street N.W., Suite 400
Washington, D. C. 20036

For the Defendants:

BODEL, FOGEL, JULBER, REINHARDT
and ROTHSCHILD
By: JOEL N. KLEVENS, ESQ.
5900 Wilshire Blvd., Suite 2600
Los Angeles, California 90036

[10] certainly members of the bargaining unit of this union are affected by that lobby. It seems to me a union has an

obligation to represent the members of its bargaining unit. It cannot possibly segregate funds in such a way that every activity of a union would be directly tied to the dues money of each single plaintiff, so that you could say, Well, yes, we're using John Doe's dues and we're doing something which is going to affect John Doe. John Doe may be a member of a large bargaining union of whom only half will be affected by activities, or only a quarter would be affected. There isn't any way to allocate sums in that manner.

THE COURT: Why isn't there a way to allocate it? It's purely an accounting situation, isn't it?

MR. KLEVENS: It's an almost impossible accounting situation, and there's not a union in the United States that has a system like that.

THE COURT: Well, maybe it's time they got them.

MR. KLEVENS: And there is no case in the United States which indicates the unions have to adopt that kind of an accounting procedure.

THE COURT: Maybe we'll make one.

MR. KLEVENS: You mean in this case, your Honor?

THE COURT: Yes.

MR. KLEVENS: Well, that certainly is the prerogative of the Court, your Honor. I would simply point out that the reason-

Exhibit "B"

[11] IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE LELAND C. NIELSEN, JUDGE PRESIDING

Civil No. 73-113-N (Ellis)
Civil No. 73-118-N (Fails)

HOWARD ELLIS, et al, ALLEN FAILS, et al, *Plaintiffs*,

v.

BROTHERHOOD OF RAILWAY, et al, *Defendant*.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California
Monday, January 12, 1976

[12] THE COURT: Who has already made up their minds.

MR. RAUH: Well, sir, that may be true, but I don't think any Court is going to stop now on the exhaustion point, but it is a frustrating part, if your Honor please, of a lawyer's function of exhausting administrative remedies, and I do it all the time because that's the way the thing is. Every once in a while you get a miracle surprise and you win, but what we have done, sir, is to do what the Supreme Court, the Tenth Circuit and District Court in this Circuit have approved. We have done it generously. We have done it more than anybody else and we cannot now do more and we ask your Honor to deny the motion for summary judgment insofar as expenditures for political causes are concerned.

Turning now to expenditures beyond political causes, plaintiffs are taking your Honor out on an uncharted sea, once you leave the political cause rule. They want to limit their dues payment to collective bargaining costs at

Western Airlines. You know what this would do? We'd get five hundred different figures. BRAC has five hundred collective bargaining agreements and I take it—although this surprises me—I take it that plaintiffs really want a rule where you'd have five hundred different figures, depending on what the cost of collective bargaining was at each of the places. It isn't going to work. It is uncharted, but it's not only uncharted sea they're asking you to go out on, but an unprecedented one because, if your Honor [13] please, in twenty-five years of the Union shop and transportation industry and forty years of the Union shop under NLRA, no Court has ever held any expenses rebatable except for political causes. There is no precedent. Not only is the sea uncharted. This is a place where no Court has ever said you'll get back beyond political causes.

THE COURT: But the Supreme sure left a gray area there, didn't they?

MR. RAUH: I think so, your Honor. I'm coming to that. You're absolutely right. There are a lot of doctrines that cause the courts trouble. They're trying to figure it out. One is exhaustion and one is deciding as little as you can and that does leave gray areas, but I think the reason no Court has ever held any expense is rebatable except for political causes really comes down to five, and I'd like to give them, sir.

First, the Railway Labor Act is clear. It says that if management and labor agree, only if they agree. Mr. Merrill made that clear this morning—only if they agree—but if they agree, a man must pay his periodic dues, assessments, and initiation fees. They don't distinguish. Of course, the political causes came out, was taken out of that by virtue of the constitutional fears of the Supreme Court in Street and Allen, but they hadn't gotten farther than that, but the LRA was clear.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 27.1 and 28.3 of the Rules of this Court, I have served the attached PETITION FOR WRITS OF PROHIBITION AND MANDAMUS, OR ALTERNATIVELY FOR A WRIT OF CERTIORARI; *and* APPENDIX on the following persons, by depositing three (3) copies thereof for each such person in the United States Mail, first-class postage prepaid, addressed as indicated:

The Honorable James R. Browning, Chief Judge
United States Court of Appeals for the
Ninth Circuit
P.O. Box 547
U.S. Court of Appeals & Post Office Building
San Francisco, CA 94101

The Honorable Arthur L. Alarcon, Circuit Judge
The Honorable Harry Pregerson, Circuit Judge
The Honorable Francis C. Whelan, Senior
District Judge
United States Court of Appeals for the
Ninth Circuit
United States Courthouse
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Done this .... day of December, 1981.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE: HOWARD ELLIS, *et alia*,
Petitioners,

and

ALLEN FAILS, *et alia*,
Petitioners.

On Petition for Writs of Prohibition and Mandamus, or Alternatively for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR UNION RESPONDENTS IN OPPOSITION

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---

MEMORANDUM FOR UNION RESPONDENTS IN OPPOSITION

The petition for writs of prohibition and mandamus, or alternatively for a writ of certiorari grows out of a proceeding entitled *Ellis, et al.* v. *BRAC, et al.* (S.D. Ca., Nos. CV 73-113 & CV 73-118) and the appeal and cross-appeal from the district court's judgment therein entitled *Ellis, et al.* v. *BRAC, et al.* (C.A. 9, Nos. 80-5562 & 80-5603). The Brotherhood of Railway, Airline and Steamship Clerks (BRAC), BRAC System Board of Adjustment No. 451, California State Legislative Committee of BRAC, Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014, and Arrowliner Lodge Local 3049 (hereafter the "Union"), the defendants in the district court and the defendants/appellees/cross-appellants in the

court of appeals, hereby respond to that petition. In setting out the opinions below petitioners note:

> The subject-matter of this Petition is two Orders the United States Court of Appeals for the Ninth Circuit promulgated on 2 November 1981. One of these Orders—*per* the panel composed of Judges Pregerson, Alarcon, and Whalen—denied Petitioners' Emergency Motion for Extraordinary Relief in that court [designating an *en banc* panel not including Judges Pregerson, Alarcon, or Whelan, to hear and decide the *Ellis* appeals]. The other Order—*per* Judge Pregerson alone—denied Petitioners' Emergency Motion for Recusal. [Pet. 3.]

We treat herein with each of those orders in turn.

1. The emergency motion for extraordinary relief on which the petition is initially founded was filed on the eve of oral argument in the court of appeals to challenge the panel selected to hear and resolve the *Ellis* appeal and cross-appeal on the theory that the panel selection procedures may have been tainted by improper influence. The Ninth Circuit panel immediately instituted an investigation. After that investigation, the panel ruled:

> No facts have been alleged from which an inference can be drawn that the panel selected to hear this matter was selected improperly or in violation of Ninth Circuit *General Orders* 3.1-3.3 and the Ninth Circuit *Internal Operating Procedures* (2nd Ed. 1981). The Circuit Executive, without knowing which cases will ultimately be assigned to any panel, selects panels after considering the judges' availability, the number of times each judge has sat in each of the locations that year, and the number of times each judge has sat with the other judges that year. The Staff Attorneys' office independently prepares groups of case "clusters" by feeding data concerning each case into a computer. The Clerk's office then randomly matches each cluster of cases with a panel. It is only after this process is completed that the Clerk learns the identity of the panel members. We believe this

> procedure, when followed, is foolproof. Mr. Chris Vasil, Acting Clerk of the Court, has advised the panel that this procedure was followed in this case. Assuming for purposes of disposing of this motion that the statement attributed to Mr. Bodle was made —a fact that he denies in his affidavit filed November 2, 1981—no facts have been presented in the motion, in Mr. Reilly's affidavit [filed in support of the motion], Mr. Rauh's affidavit, or Mr. Bodle's affidavit [both filed in opposition to the motion], from which it can be inferred that the procedure outlined above was not followed. [Pet. App. 6a.]

This ruling is based on the undisputed facts set out in the margin which were before the court below by reason of a memorandum prepared by the acting clerk of the court of appeals, Christopher W. Vasil, and sworn affidavits filed by the Unions' chief counsel in this case since 1975, Joseph L. Rauh, Jr., and by the Unions' former counsel in the district court, who did not participate in the appeal, George E. Bodle.[1]

---

[1] Acting Clerk Vasil advised the Ninth Circuit panel:

> With regard to the procedures for calendaring the above-captioned cases for oral argument, please be advised that I have reviewed the procedures involved in setting the November calendar and can find no deviation from the standard "blind assignment" system for assigning cases to panels. The panel assignments were prepared in the Office of the Circuit Executive. The case clusters were prepared in the Staff Attorney's Office. The Clerk's Office then randomly assigned the case clusters to the panels. The only panel change that occurred after the initial assignment of these cases was the replacement of Judge Wilkins by Judge Whelan. [Pet. App. 9a.]

Mr. Bodle stated:

> I have not made any effort, at any time, directly or indirectly, to influence the composition of the appellate panel to hear this case.
>
> * * * *
>
> I am not personally acquainted with any of the judges who have been assigned to hear this case on appeal. I have never had a personal conversation on any subject with any one of them. Of the three, I have appeared only before Judge

While the petition is long on harsh rhetoric, it is fatally short in showing that the Ninth Circuit panel was wrong, much less clearly wrong, in concluding (Pet. App. 6a) that the Circuit's procedure for assigning cases "when followed, is foolproof," that the "procedure was followed in this case" and that "no facts have been presented * * * from which it can be inferred that the [Circuit's] procedure * * * was not followed." Indeed, there is not even a hint in the petition as to why the lower court's careful fact-based determination raises an issue warranting this Court's attention in the normal course much less through the extraordinary course of review preceding decision in the court of appeals.

2. Attacks such as those on the panel members here, on other members of the judiciary and on opposing counsel appear to be a matter of course for petitioners' counsel. Thus in *Knight* v. *Heaney*, (Supreme Court No. 79-75), the motion for leave to file and petition for writ of mandamus and/or prohibition recited (at pp. 46-47, & 53) that the lower court was giving "aid and comfort" to a "cover-up". That motion was denied. 444 U.S. 821. Again in this case they maintain that Judge Pregerson became a panel member through improper influence rather than random choice, in the face of the contrary finding by the court below based on the undisputed facts developed through that court's investigation. Similarly, statements in the petition such as that "conspiratorial plotting to 'fix' the appellate panel" was "admitted" by Mr. Rauh (Pet. 12), have no basis in the record and are flatly contrary to Mr. Rauh's sworn

---

Pregerson on perhaps three occasions when he was sitting in the District Court. [Pet. App. 19a.]

And Mr. Rauh's affidavit declared:

> No counsel on our side of this case has made any effort at any time, directly or indirectly, to affect the composition of the appellate panel, and so far as I can determine no one has made any such effort. [Pet. App. 18a.]

These statements are confirmed by the findings of the court below.

statement: "I made it clear that I would not countenance any contact with the Court or its staff" (Pet. App. 18a.)[2]

---

[2] The Ninth Circuit panel noted:

> In February 1981 Appellants requested that the case be heard *en banc*. They argued that the case was of great constitutional significance, but did not attach Mr. Reilly's affidavit or even mention the alleged incident involving Mr. Bodle in their supporting papers. Pursuant to *General Order* 5.2, Judge Goodwin circulated the request to all active judges. Since no judge called for the *en banc* hearing of the case, the case, pursuant to General Order 5.2, was in due course assigned to a panel.
>
> If Appellants believed that the alleged incident constituted grounds for an *en banc* hearing of the case, that argument should have been made in the original *en banc* request. Appellants claim Mr. Bodle made his statement in October 1979, but Mr. Reilly's affidavit was not prepared until October 1980, and not filed with this court until October 28, 1981—two days after Appellants were notified of the names of the judges assigned to hear the case and five days before the scheduled oral arguments. If Appellants are dissatisfied with the decision of the panel they can, of course, request a rehearing *en banc* at that time. [Pet. App. 6a-7a]

That point serves to put the extraordinary motions in the court below and the petition here into perspective—the motions and petition are but the latest in a series of delaying tactics by petitioners over the last six years designed to frustrate prompt appellate review of an interlocutory summary judgment favorable to their position issued in January of 1976. When the district court certified that ruling to the court of appeals, petitioners successfully opposed acceptance of the certification. Thereafter, when the trial had long been postponed by petitioners continuing "discovery" efforts, it required an order of the district court to move the case to trial. (D.C. Tran., Jan. 16, 1978, at 28.) After the trial, petitioners delayed final deposition of this case in the district court by withholding for some six months the filing of their proposed judgment. And in the Ninth Circuit petitioners made eight successive dilatory motions, including one to remand the case without briefing and argument, until the court of appeals' order of August 13, 1981 finally barred them from pursuing further delay.

3. With regard to the emergency motion for recusal, we refer the Court to Judge Pregerson's responding order (Pet. App. 11a-13a) for we do not believe it meet or proper for one party to a case to comment on a judge's fully explicated determination not to honor the other party's request for recusal.

CONCLUSION

Petitioners' motions in the court of appeals on the eve of the oral argument, and their persistence in renewing their presentation in this Court, is of a piece with their overall effort to delay appellate resolution of the issues raised by this case. Upon due investigation, the Court of Appeals concluded that petitioners' unsubstantiated surmise is unfounded, and that nothing occurred to disturb the proper working of the carefully safeguarded procedure by which the Ninth Circuit assigns cases and judges. Accordingly, it is submitted that the petition should be denied.

Respectfully submitted,

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